

**Feld & Sons, Inc. t/a Today's Man and Philadelphia Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO.** Cases 4-CA-9490-1, 4-CA-9490-2, and 4-CA-9426

August 12, 1982

### DECISION

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER

On September 24, 1981, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions, and a brief in support thereof and in opposition to Respondent's exceptions, and counsel for the law firm of Pechner, Dorfman, Wolffe, Rounick & Cabot, a Pennsylvania Partnership, and Leonard Schaeffer, Stephen J. Cabot, Martin J. Sobol, Jerome Cureton, Robert J. Simmons, and Kenneth M. Jarin, individual attorneys, hereinafter called counsel for the Pechner firm, filed cross-exceptions and a brief in support thereof and a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommendations.<sup>2</sup>

Respondent excepts to the Administrative Law Judge's Order granting the motion of counsel for the Pechner firm, which was joined by the General Counsel, the Union, and separate counsel for attorneys Steiner and Dabrow, to strike the entire testimony of Respondent's president, David Feld, because of his defiance of the Administrative Law Judge's Order to respond to questions on cross-examination. The relevant facts and circumstances which led to this ruling are set forth in the Admin-

istrative Law Judge's Order, which is attached hereto as the Appendix. We find, in agreement with the Administrative Law Judge, that, although Feld's conversations with Respondent's counsel, Paul Rosen, are protected by the attorney-client privilege, Feld may not assert this privilege in the circumstances herein. Respondent petitioned the Board to set aside its settlement agreement with the Union, contending, *inter alia*, that Feld executed this agreement in reliance upon self-serving advice of the Pechner attorneys. The Board can not reasonably evaluate this contention without knowing whether Feld also received advice on the subject from other counsel. Thus, the Administrative Law Judge's direction to Feld to respond to the question and his Order striking Feld's testimony upon his failure to answer were proper. See Sections 102.35(f) and 102.44(c), Board's Rules and Regulations, Series 8, as amended.

Respondent contends that the General Counsel's failure to seek Federal court enforcement of the *subpoena duces tecum* demanding Respondent to produce documentary evidence of Feld's conversation with Rosen somehow excuses Feld's defiance of the Administrative Law Judge's direction to answer questions on this issue at the hearing. We find this argument to be without merit. The General Counsel may not be forced to seek enforcement of a validly issued subpoena at the whim of the party that refuses to comply with it. *Hedison Manufacturing Company v. N.L.R.B.*, 643 F.2d 32, 34 (1st Cir. 1981). *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) [Gyrodyn Co. of America] v. N.L.R.B.*, 459 F.2d 1329, 1343 (D.C. Cir. 1972). Moreover, Respondent's defiance of Board authority in one instance does not justify its failure to cooperate in another.

Respondent also excepts to the Administrative Law Judge's ruling overruling Respondent's objection to cross-examination testimony by several attorneys from the Pechner firm recounting certain statements and threats allegedly made to them by Rosen at a Philadelphia restaurant in March 1979. Respondent now contends that this testimony should have been excluded on the grounds that it was hearsay evidence as well as beyond the scope of direct examination and irrelevant. At the hearing Respondent only objected on the grounds that this line of questioning was beyond the scope of direct examination as well as irrelevant. We find that since Respondent did not then object on the grounds that it was hearsay, it may not now claim to have a meritorious exception to this ruling on hearsay grounds. See "McCormick's Handbook of the Law of Evidence" § 52 (E. Cleary ed. 1972).

<sup>1</sup> Respondent and the Pechner's attorneys has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We have also considered Respondent's contention that the Administrative Law Judge has evidenced bias and prejudice against Respondent, as manifested by his evidentiary rulings and factual findings. We have carefully considered the record and the attached Decision and hereby reject these charges.

<sup>2</sup> By motion filed with the Board on November 2, 1981, Respondent requested oral argument. This motion is hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

We further find that the Administrative Law Judge correctly ruled that this line of questioning related to issues raised on direct examination, and was relevant to the issue of Feld's motivation for executing the settlement agreement. Accordingly, we find no merit to this exception.<sup>3</sup>

The General Counsel filed a motion to strike certain portions of Respondent's brief and exhibits attached thereto. The Pechner attorneys filed a joinder to this motion. These parties request that we strike all references to Exhibits A and B from Respondent's brief. Exhibit A is the stenographic transcript from the change of plea hearing of Respondent's president, David Feld, in a criminal case stemming from the circumstances involved in the instant case. Exhibit B is a document entitled "Brief on Behalf of the General Counsel to Administrative Law Judge Walter J. Maloney, Jr., in the cases of *W.C. McQuaide, Inc.*, 6-CA-7509 and 6-CA-7770." These exhibits attempt to impeach the credibility of certain witnesses whose testimony was unfavorable to Respondent. The moving parties further request us to strike all references in Respondent's brief to a letter dated March 13, 1979, from Respondent's counsel to counsel for the Pechner firm requesting, essentially, that counsel seek enforcement in Federal court of a *subpoena duces tecum* issued against Respondent. We find that these exhibits and references were not admitted into evidence at the hearing, and, therefore, are not part of the record in this proceeding. We note that consideration of these documents would deny the parties the opportunity for *voir dire* and cross-examination, and would violate the Board's Rules. See Section 102.45(b) of the Board's Rules and Regulations, Series 8, as amended; *S. Freedman Electric, Inc.*, 256 NLRB 484, fn. 1 (1981); *Southern Florida Hotel & Motel Association, and its employer-members The Estate of Alfred Kaskell d/b/a Caril-*

*lon Motel; The Estate of Alfred Kaskell d/b/a Doral Hotel and Country Club; The Estate of Alfred Kaskell d/b/a Doral Beach Hotel*, 245 NLRB 561, fn. 6 (1979).

The moving parties also ask us to strike all references in the briefs to David Feld's testimony, contending that, since the Administrative Law Judge struck all of Feld's testimony, it is not properly a basis for argument in the brief. As we herein affirm the Administrative Law Judge's ruling in this regard, we find merit to this contention. Accordingly, we hereby grant the motion to strike the portions of Respondent's brief requested by the moving parties.

## DECISION

### STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The original charge in the unfair labor practice case in this matter was filed by Philadelphia Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, herein called the Union, on July 3, 1978.<sup>1</sup> Additional unfair labor practice charges were filed on August 11 and September 13. In addition, the Union also sought 10(j) injunctive relief.<sup>2</sup> On October 6, a complaint issued alleging that Feld & Sons, Inc., t/a Today's Man, herein called Respondent, violated Section 8(a)(1), (3), (4), and (5) of the Act. The complaint came to hearing before Administrative Law Judge Morton Friedman on October 23. After the hearing opened, the complaint was settled by formal settlement agreement between the General Counsel and Respondent. The Union declined to join. The settlement was approved by the administrative law judge, and subsequently approved by the Board which issued its order on January 19, 1979. Application for enforcement of the Board's order was made to the United States Circuit Court of Appeals for the Third Circuit on March 1, 1979, and opposed by Respondent. In this posture, the Board and the Employer stipulated to the remanding of the case to the Board for the purpose of taking evidence regarding the circumstances surrounding the execution of the settlement agreement. On February 11, 1980, pursuant to a petition filed by Respondent on November 14, 1979, the Board issued an Order Remanding Proceeding to the Regional Director, directing that a hearing be held before an administrative law judge "for

<sup>3</sup> By letter dated December 31, 1981, Respondent's counsel, Paul R. Rosen, requested the Administrative Law Judge to delete language from his Decision concerning Rosen's activities at the restaurant. The Administrative Law Judge referred this letter to the Board's Executive Secretary, who determined that it constituted an *ex parte* communication under Sec. 102.128(e) of the Board's Rules and Regulations, Series 8, as amended. Accordingly, pursuant to Sec. 102.132 of the Board's Rules, the Executive Secretary caused Rosen's letter to be placed on the public record of the proceedings and permitted all parties to file with the Board a statement setting forth facts or contentions to rebut those contained in Rosen's letter. Thereafter, statements were filed by the General Counsel, counsel for the Pechner firm, counsel for attorneys Julius M. Steiner and Allan M. Dabrow, counsel for the Philadelphia Joint Board of the Amalgamated Clothing and Textile Workers Union, and counsel for Mr. Rosen. The General Counsel, in addition to responding to the statements contained in Mr. Rosen's letter, suggested that the Board consider invoking penalties against Mr. Rosen pursuant to Sec. 102.133(b) of the Board's Rules, in order to discourage parties and their counsel from engaging in prohibited *ex parte* communication.

We are of the opinion the relief requested by Mr. Rosen should not be granted. Furthermore, the circumstances herein do not require that we institute proceedings against Mr. Rosen pursuant to Sec. 102.133(b) of the Board's Rules.

<sup>1</sup> All dates refer to 1978 unless otherwise indicated.

<sup>2</sup> Sec. 10(j) provides:

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

the purpose of receiving evidence concerning the circumstances surrounding the execution of the Formal Settlement Stipulation entered into, on October 27, 1978, between the Respondent and the General Counsel of the National Labor Relations Board."

A hearing was held on this matter before the Administrative Law Judge on various dates between May 6, 1980, and April 21, 1981. Briefs have been duly filed by General Counsel, Respondent, and counsel for the Pechner firm. The Pechner firm's brief was joined by counsel for Steiner and Dabrow. All briefs have been duly considered.

#### I. THE FACTS

##### A. Representation Case (Case 4-RC-13254)

The circumstances leading to the remand and hearing in this case involve related representation and unfair labor practice cases.

The petition in the representation case was filed on June 23, seeking to represent a unit of warehousemen at one of Respondent's locations. A hearing was held on various dates in July, August, and September 1978 to determine the eligibility of certain employees, including Larry Feld, Jacob Jacobson, and David Klein, whom Respondent was contending were eligible to vote as warehouse employees. The hearing officer conducting the hearing on behalf of the Board was Stephen Suflas, field attorney with Region 4. Respondent was represented by attorneys Julius M. Steiner and Allan M. Dabrow of the Pechner firm. The Union was represented by attorney Robert Tim Brown. During the course of the hearing, on August 23, certain documentary evidence was introduced concerning wages which contradicted certain testimony adduced from Jacobson, Klein, David Feld, and Allan Becker, all witnesses for Respondent.<sup>3</sup> Suflas, suspecting perjury, brought this matter to the attention of certain supervisory employees in Region 4, including Regional Director Peter W. Hirsch.

In early October 1978, Hirsch, having determined that the evidence suggested that perjury had been committed by the four above-named individuals, decided to refer the matter to the office of the General Counsel in Washington, D.C. In a memorandum dated October 18, Hirsch recommended referral of the perjury matter to the Department of Justice. While Hirsch, Suflas, and others had discussed the possible involvement of the attorneys and David Feld in suborning the perjury, this matter was not raised in Hirsch's memo because these suspicions had not been substantiated.

##### B. Unfair Labor Practice Case and Formal Settlement Stipulation<sup>4</sup>

The first unfair labor practice charges were filed on July 3, shortly after the filing of the petition, and the

case was assigned to Suflas for investigation. After the investigation, a determination was made that the case had merit and efforts were made to settle the case prior to the issuance of complaint. Martin Sobol, a lawyer in the Pechner firm, who had become involved with Steiner in the case, held a settlement discussion on August 22 at the Regional Office with Suflas. Also in attendance were Bernard Dinkin, education director of the Union, as well as union attorneys Jerome Markovitz and Robert Tim Brown. Various terms of a prospective settlement were discussed without resolution.

On the following day, August 23, Suflas reported to Hirsch and Charles Cohen, deputy regional attorney, concerning the prior day's settlement discussion. Suflas was told to make it clear to Sobol that any settlement of the unfair labor practice case would not dispose of any other outstanding matters involving other violations of Federal law. On the following day, August 24, Sobol called Suflas to discuss settlement, and, during the course of this conversation, Suflas told Sobol that any settlement would not affect the disposition of any other Federal law violations. Sobol asked what this meant, and Suflas told him that he was referring to the perjury matters arising out of testimony at the representation case hearing. Sobol relayed this information to Steiner who called Suflas on August 25. Steiner, while not referring to the perjury matter, told Suflas that he was withdrawing his representation case contention that Jacobson, Klein, and Larry Feld were employees in the warehouse unit.

As noted above, complaint issued in the unfair labor practice case on October 6. On this same day the Regional Office requested authorization to seek 10(j) injunctive relief against Respondent. The unfair labor practice hearing was scheduled for October 23.

On Saturday, October 21, a warehouse employee named Tyrone Evans, who had been served by Suflas with a Board subpoena to appear at the unfair labor practice hearing, was asked by David Feld to attend the meeting at which David Feld and Steiner were present, among others. After the meeting, Evans complained to Dinkin about the conduct of Feld and his lawyers at the meeting. Dinkin relayed this information to Suflas who interviewed Evans. He was told by Evans that an attempt had been made to induce him not to honor the subpoena previously served on him by Suflas.

On the morning of the hearing, Monday, October 23, before the hearing was to begin, Suflas brought this "Saturday incident" to the attention of Hirsch and a decision was made to treat and investigate it as an unfair labor practice allegation. While it is clear that there was a discussion about the possibility that Section 12 of the Act<sup>5</sup>

witnesses with similar apparent interests. In evaluating the testimony of witnesses, I rely specifically upon their demeanor and have made my findings accordingly. While apart from considerations of demeanor I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to fully consider it. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966). I also note that the record is void of any admissible testimony from David Feld since his testimony was stricken when he failed to respond to relevant inquiry on cross-examination.

<sup>5</sup> Sec. 12 reads:

<sup>3</sup> David Feld and Larry Feld are brothers.

<sup>4</sup> It is conflicting testimony regarding some of the matters raised at the hearing. In resolving these conflicts I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the apparent probabilities, the probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other

*Continued*

had been violated, there was no action taken to undertake any investigation of the Section 12 aspect of the matter. Hirsch credibly testified that he was not considering the possibility of pursuing any possible Section 12 violation.

Later on the morning of October 23, but still prior to the opening of the hearing, Suflas advised Steiner of the decision to treat the "Saturday incident" as an additional unfair labor practice charge, and arrangements were made to interview the participants at the offices of the Pechner firm that evening. This was done. Suflas and Barbara Allen, another Board attorney assigned to assist Suflas at the hearing, conducted the investigation. David Feld attended the entire session. Attorneys Stein and Sobol were also present, as well as Barry Bevacqua, another Pechner attorney who had participated in the "Saturday incident." On Tuesday morning, Suflas reported to Hirsch on the matter, and a decision was made to amend the complaint to allege an 8(a)(1) violation in that both Feld and Steiner had made promises to Evans to unlawfully induce him not to honor a Board subpoena.

The information that a decision had been made to amend the complaint to add these violations was conveyed by Suflas to Bevacqua on the afternoon of Tuesday, October 24, after the hearing had adjourned for the day.

On Wednesday morning, Stein and Bevacqua entered into a discussion concerning a settlement with Suflas and Allen. Stein and Bevacqua expressed a desire to settle the 8(a)(1) "Saturday incident" allegation separately, in an informal settlement agreement, but this proposal was rejected by Suflas after consultation with Hirsch, consistent with the Region's policy of not settling cases on a "piece meal" basis.

Having failed in his attempt to settle the "Saturday incident" separately, Steiner requested the Administrative Law Judge to adjourn the hearing in order to enable him to prepare a defense to the allegation and to consider whether he should continue as counsel for Respondent in view of conflict-of-interest considerations because of his involvement in the "Saturday incident" allegation. This request was opposed by both Cohen and Suflas, on the record, as a possible delaying tactic and on the ground that there were other attorneys in the Pechner firm who were able to handle the hearing on behalf of Respondent. By way of compromise, it was determined to continue the hearing without amending the complaint to add the Saturday incident, and the General Counsel would rest subject to a resolution of that matter.

At the start of the hearing on Wednesday, October 25, while David Feld was in attendance, Steiner expressed reservations about his continued participation in the case as Feld's counsel "due to ethical considerations," and again requested a postponement, however, in conformity to the agreement previously reached off the record, the hearing proceeded.

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Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

Later in the course of the hearing on Wednesday, Steiner, becoming concerned about the possibility of a conflict of interest in his continued participation in the case, and that the matter was getting out of control, called his office to solicit the assistance of Sobol who came to the hearing. He was filled in by Steiner as to what had transpired earlier in the day.

At this point, Sobol sought out Cohen in the hallway and upon inquiry was advised by Cohen that 10(j) relief has also been recommended, that the Saturday incident raised the possibility of a Section 12 violation, and that the Region had requested authorization from the General Counsel in Washington to refer the perjury matter to the Department of Justice.

After this conversation with Cohen, Sobol returned to Steiner and Feld. He explained to them the nature of the 10(j), perjury, and possible Section 12 violations. Sobol specifically explained to Feld that Section 12 included interference with Board processes and possible criminal implications. He also expressed a pessimistic view as to winning the unfair labor practice case, and told him that the Board would likely be successful in obtaining 10(j) injunctive relief which would require Respondent to bargain with the Union anyway. Sobol suggested arranging a meeting to discuss settlement with the Regional Director. He also told Feld that he might want to discuss the matter with Paul Rosen.<sup>6</sup> A meeting was arranged for the following morning with Hirsch, and the hearing was temporarily adjourned to accommodate the settlement effort.

Feld was asked by Sobol if he wanted to attend the meeting, and Feld rejected this invitation saying, "I'm not going to talk to those ass holes, that's what I am paying you for."

The meeting was held on the morning of Thursday, October 26, in Hirsch's office. It was attended by Steiner, Sobol, Bevacqua, and Stephen Cabot, head of the labor department of the Pechner firm. Also in attendance, representing the Region, were Hirsch, Cohen, Suflas, Allen, and at various times, Frances Hoeber, assistant to the Regional Director. A discussion of the unfair labor practice allegations ensued, including the Region's intention to seek relief under 10(j) of the Act, as well as the Saturday incident. Cabot suggested that the "Saturday incident" be settled separately, but, as he had done previously, Hirsch rejected this approach. While it appears that there may have been some discussion concerning the criminal aspects of Section 12, it was insignificant, and clearly no decision made to pursue the Saturday incident as a Section 12 violation. The matter of the representation case perjury was raised by Hirsch, who advised the Pechner attorneys that the matter had been referred by memo to Washington with a recommendation to refer the matter to the Justice Department and naming David Feld, Klein, Jacobson, and Becker as those involved.

With respect to the matter of settlement, Hirsch was still insisting on a full settlement providing for reinstatement, backpay, and a bargaining order, adding that he

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<sup>6</sup> Paul Rosen was corporate counsel for Respondent.

would be willing to discuss "any settlement." The Pechner's attorneys left Hirsch's office to caucus, whereupon Cohen, Suflas, and Allen expressed surprise that Hirsch had agreed to discuss "any settlement," since this appeared to include the possibility of a settlement of the perjury matter. Hirsch told them that this had not been his intention. When Sobol returned, alone, to Hirsch's office it was made clear to him by Cohen that, as far as he was concerned, he would advise Sobol to prepare his client for a referral of the perjury matter. Hirsch nodded his head in assent to the statement. Sobol remarked that he would try and settle the case and left.

On the afternoon of this same day, Thursday, October 26, a meeting was held between David Feld and Pechner firm attorneys Cabot, Steiner, and Sobol. The purpose of the meeting was to apprise Feld of the developments. It was explained to Feld by Cabot that 10(j) relief was being pursued and that the Board would likely prevail. In discussing the "Saturday incident," Feld was told that the matter might involve Section 12 violations, but also that the settlement would dispose of the entire Saturday incident. Apparently this evaluation of the settlement prospects to include any possible Section 12 violations were based on interpretations gleaned from earlier settlement discussions with the Region about the "Saturday incident." Feld was also expressly advised that the settlement did not include settlement of the perjury allegations. While Feld was concerned that the perjury matter would not be resolved by any settlement, he nonetheless authorized Sobol to settle the case on the best terms he could get.

Sometime later, on the same Thursday afternoon, October 26, Sobol telephoned Hirsch in his office. Suflas, Cohen, Allen, and at times Hoeber were present during this conversation. Sobol asked if there were any way to resolve the perjury matter. Hirsch replied that he did not know of any. Sobol pleaded with Hirsch for enlightenment, and after some prodding, Hirsch told Sobol that, if the Union and the Employer were to sign a contract, the Union might be persuaded to bring this to the attention of the General Counsel in Washington who might conclude that, in the interest of industrial harmony, it would be better not to pursue the perjury matter. Hirsch told him that any decision would be made by the General Counsel in Washington, and not him. Sobol's recollection varies to the extent that he recalls Hirsch saying that upon reaching an agreement on a contract, the Union could intercede directly with Hirsch, rather than the General Counsel, with the understanding that Hirsch would seriously reconsider his recommendation, but without guarantees. In view of the corroboration of Hirsch's version by Cohen, Suflas, and Allen, I conclude that Hirsch's version is more accurate and I credit it. Following this suggestion, Sobol indicated that he would meet and attempt to negotiate a contract with the Union. Shortly thereafter Sobol called Hirsch again to inquire if the perjury referral memo, then with the General Counsel in Washington, contained anything about subornation of perjury. Hirsch told him that it did not; that they had no evidence of subornation of perjury.

On the evening of Thursday, October 26, a meeting was held at the union hall attended by various union offi-

cial. Respondent was represented by David Feld, Sobol, Steiner, and Bevacqua. Outside the union hall, before going in, Sobol, in the presence of Steiner and Bevacqua, told Feld that Hirsch had agreed to reconsider his perjury recommendation if Respondent and the Union agreed on a contract, and the Union interceded with him, but without guarantees.<sup>7</sup> At the meeting Sobol explained to the Union what had happened and that it needed the Union's help in its effort to get Hirsch to reconsider the perjury recommendation. The Union offered Respondent its standard area contract and also made a demand for recognition of the employees in Respondent's retail stores. This proposal generated considerable disagreement. Sobol explained several alternatives, with a view toward obtaining a contract, but the parties could not agree and negotiations broke down. In reviewing the negotiations with Feld, Sobol asked him to continue because the perjury charges were serious and a contract was a possible way out. Feld however was disinclined to continue and left, remarking, "I don't want to deal with these ass holes, fuck it, the perjury is bullshit, I'll take my chances with the Justice Department."

As Feld was leaving, Sobol approached him in the parking lot, and again, with a view to pursuing negotiations with the Union, tried to reason with Feld. Sobol testified, "I kept saying, do you realize what's at stake here? He said, 'I don't give a shit . . . ' referring to the Justice Department problem and the referral. He said, 'I don't give a shit, these guys are pigs, they're whores, I don't want to deal with them, I don't want a contract with them, don't ever want a contract with them.' That's what he kept saying."

With the respect to the execution of a settlement agreement, Sobol testified, "I said, David you still want me to settle as we talked about this afternoon, do I have the authority to do that. He said, 'Yes, go ahead.' I said, 'I don't think you should leave here, as I told you upstairs. How much could it possibly cost you to get a contract with the Union and the warehouse? I said, 'It's a chance you can get rid of the perjury.' I told him that there was no guarantee about it but there's a chance. He said, 'The perjury is bullshit. I'm gonna to take my chances with it. It ain't no big deal. I've been through worse.' That's what he said to me. I said, are you sure. He said, 'Yeah.'"

Thus armed with the authority to settle the case, the Pechner attorneys, i.e., Sobol, Steiner, and Bevacqua, met on Friday morning, October 27, with Hirsch, Suflas, Allen, and Cohen. The Region had already drafted a formal settlement agreement and discussions ensued over certain provisions of the agreement. Some changes were made, including the granting of nonadmission clause, a compromise to 80 percent of the full backpay liability, and an installment plan for the disbursement of backpay.

The settlement discussion included the matter of Steiner's liability in the "Saturday incident." He objected to being named individually in the formal settlement and sought various other ways to mitigate the professional damage to himself. Hirsch acceded to removing Steiner's

<sup>7</sup> This represents Sobol's inaccurate recollection of Hirsch's suggestion.

name from the caption of the settlement, and deleting the word "Esquire" after Steiner's name.

Another meeting on the settlement agreement took place in the afternoon, on the same day, Friday, October 27. It was at this meeting that Hirsch advised Sobol, Steiner, and Bevacqua that the settlement effectively remedied the Saturday incident and that it was not his intention to pursue Section 12 criminal proceedings involving the Saturday incident. Steiner suggested that this understanding be reduced to writing, but Sobol and Hirsch did not feel any written documentation was necessary, and this forbearance as to Section 12 was not written into the formal settlement agreement.

Since Steiner himself was to be a signatory to the agreement, Cohen suggested that Feld also sign the settlement. It was also a policy of the Pechner firm to have clients sign settlement agreements, and, so when Feld arrived, he was given a copy of the settlement agreement by Bevacqua and asked to read it. He did, thereafter suggesting certain changes, including reducing of numbers posting locations, which matter was later compromised.

Prior to signing the settlement agreement, Feld conferred with both Bevacqua and Steiner. Bevacqua testified, "Well, Mr. Feld made the statement to Jules [Steiner] that, quote, and these are his words, I recall them 'This doesn't clean everything does it, the perjury is still out there.' I think he said that. And I said, even though he spoke to Jules, I said, 'No it doesn't, this just settles the unfair labor practice cases.'" Feld responded to this observation by saying something to the effect, "fuck them, I'll take my chances with the Justice Department."

The settlement agreement was signed by Feld and Steiner for Respondent and by Suflas and Allen on behalf of the General Counsel. It was approved by the Administrative Law Judge. The Union declined to join the settlement agreement.

On November 1, after the execution of the settlement agreement, Hirsch received authority from the General Counsel to refer the perjury matter to the Justice Department pursuant to the Regional Director's recommendation. Steiner who had asked Hirsch to be notified whenever such referral was made was notified. On December 1, the matter was referred to the U.S. Attorney's Office. Sometime thereafter, Hirsch had a meeting with the U.S. Attorney, wherein Hirsch voiced his suspicion that subornation of perjury had taken place, but Hirsch could not recall whether or not he referred specifically to any of the Pechner attorneys.

About a week after the settlement agreement was executed, Dabrow, in a meeting with Feld, suggested to him that he retain a criminal lawyer because of the outstanding perjury charges. Kenneth Jarin another Pechner attorney, met with David Feld, Klein, Jacobson, and Becker in early 1979 to confer with them about the Federal perjury investigation. Feld did not in either of these discussions express the view that he understand the perjury matter to have been disposed of as a part of the settlement agreement.

As the perjury matter proceeded, Feld met on various occasions with members of the Pechner firm including Dabrow, Sobol, and Cabot. He told Sobol that he

wanted them to testify that Hirsch had agreed that the perjury matter was included in and resolved by the settlement. He acknowledged that this was not true, but he felt that this was his only chance to avoid the perjury charges. Sobol told him that these were not the facts, and that he would not lie for Feld.

Rosen made a similar effort in March 1979, in a meeting at a local restaurant when he proposed to a group of Pechner attorneys, including Sobol, Steiner, Bevacqua, and Leonard Schaeffer, a scenario of events to defend the perjury case, which included testimony by the Pechner attorneys to the effect that Hirsch had agreed to include the perjury matter in the settlement agreement. Sobol told him that it did not happen that way, whereupon Rosen told him that he controlled certain witnesses and that, if the attorneys did not cooperate, Steiner and Dabrow were going to jail.<sup>8</sup>

Feld made another attempt to secure the cooperation of the Pechner attorneys in his defense to the perjury matter. In July 1979, in a meeting at another Philadelphia restaurant with Cabot, Feld asked Cabot to make an effort to persuade Sobol to testify that Hirsch had included the perjury in the unfair labor practice settlement. When Cabot told him that he would not lie for him, Feld told Cabot that he (Feld) controlled the witnesses, and that, if he went "down the tubes," the lawyers were going with him.

The perjury investigation by the Justice Department resulted in two indictments, the first indictment was returned against Jacobson, Klein, and Becker charging them with perjury. A second indictment charged David Feld, Steiner, Dabrow, Becker, Jacobson, and Klein with conspiracy, subornation of perjury, obstruction of proceedings before a Federal agency, and interference with a Board agent. Feld pleaded *nolo contendere* to one count of violating Section 12 of the Act. Klein, Becker, and Jacobson plead guilty to one count each of interference with a Board agent in violation of Section 12 of the Act. Steiner and Dabrow were acquitted after a jury trial on subornation of perjury charges.

Later, a civil malpractice suit was filed by Feld against the Pechner attorneys, which was dismissed, on the pleadings, in the Court of Common Pleas of Philadelphia County on July 2, 1981. Judge Kaliashr concluded, *inter alia*, "The client [David Feld] knowingly lied under oath; knowingly falsified time and payroll records; knowingly used corporate funds to bribe a witness to ignore a subpoena. It is difficult to conceive of a situation of greater outrageous conduct designed to thwart the administration of justice."<sup>9</sup>

## II. DISCUSSION AND ANALYSIS

As noted above, this case was remanded by the Board on a petition filed by Respondent, "for the purpose of taking testimony concerning the circumstances surrounding the execution of the Settlement Agreement." The sole issue for resolution was whether or not those cir-

<sup>8</sup> Apparently, this was a reference to the criminal subornation of perjury issue arising from the representation case hearing.

<sup>9</sup> These conclusions were based on factual averments made by Respondent in the complaint.

cumstances describe a sufficient basis to warrant setting aside the formal settlement agreement.

Respondent contends that both the Pechner attorneys and the Regional Director engaged in misconduct sufficient to warrant setting the settlement agreement aside. First, Respondent claims that Feld was not aware that the settlement agreement signed by him on October 27 did not include disposition of the perjury matter. In examining this contention, a review of the Region's handling the perjury matter is in order. Suflas' suspicions of perjury were brought to the attention of the Regional hierarchy. In early October, Hirsch decided that the evidence suggested that perjury had been committed, and on October 18 sent a memo to the General Counsel outlining the facts and recommending referral of the matter to the U.S. Attorney's Office for prosecution. Thereafter, as set forth in more detail above, the matter was returned by the General Counsel to Hirsch, authorizing referral by Hirsch to the U.S. Attorney's Office for investigation and possible prosecution. The U.S. Attorney's Office proceeded with indictments and prosecutions, resulting in the outcomes noted above. At no time was any suggestion made to any of the Pechner attorneys that the settlement of the unfair labor practices would include settlement of the perjury matter. Indeed, it would appear that at the time of the settlement, on October 27, Hirsch could not have done this since the matter was beyond his control, to the extent that it had already been referred to, and was awaiting action by, the General Counsel. In addition, the record makes it clear that the Pechner attorneys were advised in clear and unmistakable fashion that the perjury matter would not be included in the unfair labor practice settlement, despite an initial ambiguous representation made by Hirsch, which was corrected by Cohen and Hirsch immediately thereafter in conversation with Sobol.

Having concluded that the perjury allegations were never represented by Hirsch to have been disposed of in the settlement agreement, was it possible that Feld nonetheless was not aware of this and regarded the perjury matter as having been disposed of by the settlement? I think not.

The overwhelming mass of the probative evidence suggests that Feld was aware, at every significant step, of precisely what the terms of the settlement agreement were, and nevertheless authorized negotiation of the settlement, and executed it with a full understanding of its terms. For example, the evidence discloses that on the afternoon of October 26, Feld met with the Pechner attorneys and was told about settlement discussions earlier in the day at the Board offices. He was told by Cabot, *inter alia*, that the perjury matter could not be settled. Feld, although concerned, authorized Sobol to settle the case anyway.

On the evening of October 26, as they went into the union hall, Sobol explained to Feld that the purpose of meeting the Union was to reach agreement on a contract so that the Union might agree to intercede with Hirsch to reconsider his perjury recommendation. Obviously if the settlement agreement were to include the perjury matter, this evening negotiating session with the Union

would have been unnecessary, and Feld must have known this.

Again, as negotiations were faltering, Sobol tried to get Feld to continue with the negotiations, since getting a contract would at least give Feld a chance to rid himself of the perjury matter, but Feld replied that he would take his chances with the Justice Department and that the perjury charges were "bullshit." He also told Sobol that he still wanted to settle the case.

On the next day, October 27, after reading the settlement agreement, and just before signing it, Feld told Bevacqua that he knew that the "perjury is still out there." When Bevacqua affirmed this evaluation, Feld said, "Fuck them, I'll take my chances with the Justice Department," then proceeded to sign the settlement agreement.

After the settlement had been executed, in discussion with certain Pechner attorneys, Feld and Rosen attempted to induce the Pechner attorneys to fabricate testimony to the effect that Hirsch had agreed to include the perjury allegations in settlement. During these conversations Feld acknowledged the falsity of such testimony, but felt that it was his only chance on the perjury matter. Apart from this as a reprehensible attempt to subvert justice, it also constitutes an acknowledgement by Feld that he was aware that the settlement did not dispose of the perjury matter.

This record leaves no doubt whatever that Feld was fully and properly advised as to all of the terms of the settlement. He knew what the settlement included, and what it did not include. He specifically knew that it did not encompass the perjury charges, and that it did resolve all of the unfair labor practice charges, as well as any possible Section 12 violations arising from the "Saturday incident."

Another contention raised by Respondent is that the settlement should be set aside because Feld and the Board were operating under a "mutual mistake of fact" as to a material element of the settlement agreement. Hirsch's suggestion was as I have concluded, that if Respondent and the Union were to agree on a contract, the Union might be willing to intercede with the General Counsel. Sobol's version is the same, except that he had the erroneous understanding that any possible union intercession would be made to Hirsch. Thus, while it is true that Feld may have been misinformed as to this aspect of Hirsch's suggestion, it is pure sophistry to contend that this misinformation involved any material element of the settlement agreement. There is no evidence to suggest that this misunderstanding by Feld was a factor in his decision to settle the case, particularly since step one, the execution of a contract with the Union, was never realized, and subsequent steps regarding any intercession by the Union became academic, and Feld was aware of this when he signed the settlement.

Another thesis advanced by Respondent for setting aside the settlement is based on its contention that the Board had failed "to ensure that Respondent was properly and adequately represented in the settlement negotiations." Respondent contends that Steiner's involvement in the Saturday incident produced a "conflict of inter-

est," of which the Region was aware, and apparently that the Region should have consulted directly with David Feld instead of his attorneys thereafter. I do not agree.

It is a well-established principle of legal ethics that, so long as an attorney-client relationship exists, attorneys dealing with the matter are prohibited from communicating directly with the client. This policy has been accepted and is followed by the National Labor Relations Board in its dealings with respondent.<sup>10</sup> This being the case, unless extraordinary circumstances present themselves to justify direct contact with a client, the Region is obliged to deal exclusively with the party's attorney. No such extraordinary circumstances existed in this case. First, Feld was aware of any possible conflict. Feld was himself a participant in this "Saturday incident" and must therefore have been aware of the extent to which Steiner had been involved. Both were present at the Pechner firm offices on Monday evening, October 23, when Board attorneys interviewed the participants in the "Saturday incident" and thus Feld must have been aware that attorney misconduct, as well as his own, was being investigated. Feld was present in the courtroom when Steiner raised, on the record before the Administrative Law Judge, the issue of conflicting interests in seeking a postponement of the unfair labor practice case. On Thursday afternoon, in a meeting between the Pechner attorneys and Feld, the "Saturday incident" was discussed. On Friday morning, prior to signing the settlement agreement, Feld read it. Since it contained a separate "cease and desist" paragraph as to Steiner's misconduct in the Saturday incident, Feld must have known the extent to which any conflict existed between his interests and Steiner's, yet he signed it without even raising any conflict considerations. Furthermore, at no time during the course of the proceedings did Feld indicate to the Region that he was in anyway dissatisfied with the representation he was receiving from the Pechner attorneys.

In these circumstances I am convinced that Feld was in fact aware of whatever conflict may have existed and nonetheless continued to employ Steiner as his attorney with full authority to represent him. In these circumstances, if Hirsch had dealt directly with Feld he would have violated the strictures of the Canons of Professional Ethics and the expressed policy of the National Labor Relations Board.

Respondent contends that yet another basis exists which warrants setting aside the settlement agreement in that Hirsch violated the Board's Casehandling Manual policies by failing to report to the Assistant General Counsel the possibility of a Section 12 violation in connection with the "Saturday incident." Respondent contends that public policy requires setting aside the settlement agreement because Hirsch's failure to so report vio-

lates section 10054.4 of the Board's Casehandling Manual.<sup>11</sup> I do not agree.

Essentially the procedure outlined in the manual provides assistance to Agency personnel in processing matters which come before the Agency. These guidelines do not have the force of law and failure to follow them does not, *ipso facto*, invalidate subsequent action taken by a Regional Office.<sup>12</sup>

Applied to the instant case, even assuming that section 10054.5 can be construed as directing the Region to report the "Saturday incident" as a possible Section 12 violation, Hirsch's failure to do so does not invalidate the settlement. Nor does public policy require such result, especially where, as here, the failure to report it was a matter totally unrelated to the only issue under examination, to wit, whether or not misconduct existed in the circumstances surrounding the execution of the settlement agreement requiring that it be set aside. Certainly Hirsch's failure to notify the General Counsel of a possible Section 12 violation involving Feld himself cannot be viewed as having played any part in Feld's decision to execute the settlement agreement.

#### CONCLUSION OF LAW

It is my conclusion that no basis exists, in fact or law, for setting aside the settlement agreement executed on October 27, 1978, and further that the settlement agreement is valid and should be complied with forthwith.

#### Recommendation

Accordingly, it is my recommendation that compliance with the terms of the settlement agreement be obtained and that absent voluntary compliance, enforcement be sought, pursuant to its terms, in the United States Court of Appeals for the Third Circuit, where this matter was pending at the time it was remanded.<sup>13</sup>

<sup>11</sup> Sec. 10054.5 (Part One) of the National Labor Relations Board Casehandling Manual Unfair Labor Practice Proceedings reads:

10054.5 Obstruction of Justice and Perjury Allegations: Regional Office personnel should be sensitive to acts of obstruction of justice or perjury on the part of individuals involved in Board proceedings. Report immediately any acts of alleged obstruction of justice or perjury to your Assistant General Counsel. Appropriate cases will be referred by the Division of Operations Management to the Department of Justice for its consideration.

<sup>12</sup> As stated in the "Purpose of Manual" section:

This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide procedural and operational guidance for the Agency's staff in administering the National Labor Relations Act, and is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law. The guides are not General Counsel or Board rulings or directives and are not a form of authority binding upon the General Counsel or upon the Board.

<sup>13</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>10</sup> Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility reads:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with the party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such party or is authorized by law to do so.

## APPENDIX

## ORDER

On February 5, 1981, David Feld, president of Respondent, was called by counsel for Respondent, Paul Rosen, to testify with the understanding that Rosen could assert the attorney-client privilege as to communications between himself and Feld. However, during cross-examination, counsel for Pechner attorneys inquired concerning a telephone conversation between Rosen and Feld just prior to the execution of the Settlement Agreement, and contested Feld's refusal to answer, thereby abrogating the understanding. After argument by the parties, it was decided by the Administrative Law Judge that the question was relevant and not privileged under the attorney-client rule, in the circumstances of this matter.

Thereafter, before having been directed to respond to the question, Rosen withdrew Feld from the witness stand. Feld was ordered by the Administrative Law Judge to resume the witness stand for further cross-examination, and refused to do so upon advice of Rosen.

A motion to dismiss and to strike Feld's testimony was made by counsel for the Pechner attorneys, and joined by counsel for Julius Steiner and Allan M. Dabrow, the Union, and the General Counsel. Memoranda in support of these motions have been filed by counsel for the Respondent and counsel for the Pechner attorneys, which have been fully considered.

I conclude that Feld's refusal to resume the stand, when ordered to do so by the Administrative Law Judge, for a continuation of cross-examination, is tantamount to a refusal to respond to the relevant unprivileged pending inquiry on cross-examination.

The instant case was remanded by the Board upon petition of Respondent, to receive testimony concerning the circumstances surrounding the execution of the Settlement Agreement, to determine whether or not the Settlement Agreement should be set aside because of, *inter alia*, misrepresentations made to Feld by his prior attorneys which induced him to execute it. The question in issue is clearly and directly related to the circumstances surrounding the execution of the Settlement Agreement. Respondent may not preclude relevant inquiry into matters essential to the purpose for which the case was, on its petition, remanded by invoking such privilege.

Respondent's argument that it has been prejudiced in calling Feld pursuant to the understanding is denied as without merit, since Respondent is, testimonially, in the same position it would have been in had Feld never been called.

Accordingly, it is hereby ordered that the motion to strike the entire testimony of David Feld, the president of Respondent, is hereby granted.

IT IS FURTHER ORDERED that the motion to dismiss herein, be, and hereby is, denied.

/s/ Peter E. Donnelly  
Administrative Law Judge

Dated, April 2, 1981